

Natoli v City of New York

2003 NY Slip Op 30068(U)

September 24, 2003

Supreme Court, Queens County

Docket Number: 0006535/6535

Judge: Martin J. Schulman

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARTIN J. SCHULMAN IA PART 10
Justice

-----x
FRANK NATOLI Index
Number 6535 1997

- against - Motion
Date July 1, 2003

THE CITY OF NEW YORK, et al. Motion
Cal. Number 24

-----x
MALCOLM PIRNIE, INC.,

- against - Index
Number 350160 2002

MUESER RUTLEDGE CONSULTING
ENGINEERS, et al.

-----x

The following papers numbered 1 to 13 read on this motion by third-party defendant Baker Engineering NY, Inc. for, inter alia, an order pursuant to CPLR 1010 dismissing the third-party complaint and all of the cross claims against it, on this cross motion by defendant/third-party plaintiff Malcolm Pirnie, Inc. ("MPI") for summary judgment dismissing the complaint and all of the cross claims against it, on this cross motion by third-party defendant Mueser Rutledge Consulting Engineers for, inter alia, an order severing the third-party action commenced against it by defendant/third-party plaintiff MPI, and on this cross motion by third-party defendant Li-Ro Engineering and Construction Management, PC for, inter alia, an order dismissing the third-party complaint and all of the cross claims against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits ...	2-4
Answering Affidavits - Exhibits	5-8
Reply Affidavits	9-13

Upon the foregoing papers it is ordered that:

The cross motion by defendant MPI for summary judgment dismissing the complaint and all of the cross claims against it is denied.

That branch of the cross motion by third-party defendant Mueser which is for summary judgment dismissing all of the claims against it is granted. The remaining branches of the cross motion by third-party defendant Mueser are denied as moot.

The motion by third-party defendant Baker Engineering NY, Inc. for, inter alia, an order pursuant to CPLR 1010 dismissing the third-party complaint and all of the cross claims against it is denied.

The cross motion by third-party defendant Li-Ro Engineering and Construction Management, PC for, inter alia, an order dismissing the third-party complaint and all of the cross claims against it is denied.

(See the accompanying memorandum.)

Dated: September 24, 2003

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 10

FRANK NATOLI

x

INDEX NO. 6535/97

- against -

BY: SCHULMAN, J.

THE CITY OF NEW YORK, et al.

DATED: SEPTEMBER 24, 2003

x

MALCOLM PIRNIE, INC.,

- against -

INDEX NO. 350160/02

MUESER RUTLEDGE CONSULTING
ENGINEERS, et al.

v

Third-party defendant Baker Engineering NY, Inc. has moved for, inter alia, an order pursuant to CPLR 1010 dismissing the third-party complaint and all of the cross claims against it. Defendant/third-party plaintiff Malcolm Pirnie, Inc. ("MPI") has cross-moved for summary judgment dismissing the complaint and all of the cross claims against it. Third-party defendant Mueser Rutledge Consulting Engineers has cross-moved for, inter alia, an order severing the third-party action commenced against it by defendant/third-party plaintiff MPI. Third-party defendant Li-Ro Engineering and Construction Management, PC. has cross-moved for, inter alia, an order dismissing the third-party complaint and all of the cross claims against it.

Defendant City of New York owns a vortex facility, which separates refuse from sewer water overflow, known as the Flushing Bay/Corona Avenue Vortex Facility located at 101st Street,

Queens, New York. Defendant MPI, as the site representative of the New York City Department of Environmental Protection, provided project management and engineering services for a construction project undertaken at the facility. Defendant MPI monitored the activities of the general contractor, Perini Construction, on a daily basis and allegedly had the authority to tell Perini Construction to perform work in a certain manner and to correct hazardous conditions.

On March 28, 1996, plaintiff Frank Natoli, an employee of Perini Construction, allegedly sustained personal injury while performing construction work at the facility. The plaintiff stood on a scaffold near a large sewer pipe and used a heavy jackhammer held in a horizontal position by a rope sling to chip a hole in the pipe. The rope sling allegedly broke, and the plaintiff fell to his knees, sustaining personal injury, including the herniation of spinal disks. This action for personal injury ensued, and the plaintiff has asserted causes of action based on common-law negligence and the violation of sections 200, 240(1) and 241(6) of the Labor Law.

By summons and complaint dated March 12, 1997, plaintiff Natoli began an action for personal injury against the City of New York in this court, and, approximately two years later, by summons and complaint dated March 5, 1999, plaintiff Natoli began another action for personal injury against MPI. Mr. Justice Dye subsequently signed an order consolidating the two actions. On

February 2, 2002, defendant/third-party plaintiff MPI began a third-party action against Mueser Rutledge Consulting Engineers, Li-Ro Engineering and Construction Management, and Baker Engineering NY, Inc.

Turning first to the cross motion by defendant MPI for summary judgment, the court notes that the opponents of the cross motion had the burden of producing evidence in admissible form sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Moreover, the opponents of a motion for summary judgment are entitled to have the facts viewed most favorably to them. (See, Shannon v MTA Metro-North R.R., 269 AD2d 218; Klembczvck v Di Nardo, 265 AD2d 934; O'Connor-Miele v Barhite & Holzinger, 234 AD2d 106.)

Defendant MPI contends that it has no liability for the injury sustained by the plaintiff because it allegedly did not exercise supervision and control over the work he performed. Defendant MPI contends that it was merely an engineering firm hired to assure that contractors complied with the plans and specifications for the project. (See, Prado v Sidney B. Bowne & Sons, 207 AD2d 875.) Unless defendant MPI had supervision and control of the work performed by the plaintiff, there is no basis for imposing liability upon MPI either pursuant to common-law negligence or pursuant to the Labor Law. (See, Comes v New York State Electric and Gas Corp., 82 NY2d 876; Lombardi v Stout, 80 NY2d 290.) Insofar as common-law negligence is concerned, since

defendant MPI allegedly had supervisory control over the project insofar as matters of safety were concerned, there is a possible basis for the imposition of liability against it on common-law negligence grounds. (See, Comes v New York State Electric and Gas Corp., supra; Lombardi v Stout, supra.) Insofar as section 200 of the Labor Law is concerned, the statute "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (Comes v New York State Electric and Gas Corp., supra, 877.) In the case at bar, there is an issue of fact concerning whether defendant MPI exercised supervisory control over the project sufficient to provide a basis for the imposition of liability against it. (See, Comes v New York State Electric and Gas Corp., supra; Lombardi v Stout, supra.) Although defendant MPI alleges that it was an engineering firm merely hired to assure that contractors complied with the plans and specifications for the project, there is evidence in the record that defendant MPI was hired to be the construction manager for the project, monitored the work of the general contractor and other contractors on a daily basis, coordinated the work of the contractors, and had responsibility for the safety of the workers. Insofar as section 240(1) of the Labor Law is concerned, that statute provides in relevant part: "[a]ll contractors and owners and their agents***shall furnish or erect, or cause to be furnished or erected***scaffolding, hoists, stays, ladders slings, hangers,

blocks, pulleys, braces, irons, ropes or other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The duty imposed upon contractors and owners and their agents pursuant to Labor Law § 240(1) is nondelegable (see, Rocovich v Consolidated Edison Co., 78 NY2d 509), and a violation of the duty results in absolute liability. (Bland v Manocherian, 66 NY2d 452.) In the case at bar, there is an issue of fact pertaining to whether defendant MPI served as the agent of the owner of the project site. (See, Passananti v City of New York, 268 AD2d 512.) Insofar as section 241(6) of the Labor Law is concerned, that statute provides, inter alia, that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them. (See, Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343.) The duty imposed by Labor Law § 241(6) upon owners and contractors and their agents is nondelegable. (Rizzuto v L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp., supra.) In the case at bar, there is an issue of fact pertaining to whether defendant MPI served as the agent of the owner of the project site. (See, Passananti v City of New York, supra.)

Accordingly, the cross motion by defendant MPI for summary judgment dismissing the complaint and all of the cross claims against it is denied.

Turning next to the cross motion by third-party defendant Mueser, that defendant was hired merely to inspect the underpinnings and foundation for the project, was not at the project site on the date of the accident, and exercised no supervision or control over the plaintiff's work. Hugh Lacy, a partner in defendant Mueser, swears that his company "went to the project solely when requested by Malcolm Pirnie primarily to inspect the work on the grouting to fill voids below the street outside of the excavation for the project; we never had any control over the means and methods of construction." Although impleaded by defendant/third-party plaintiff MPI, on October 4, 2002, MPI and Mueser subsequently executed a stipulation discontinuing the third-party action against Mueser. Third-party defendant Mueser brought the instant cross motion after other parties to this action did not sign the stipulation. Third-party defendant Baker and third-party defendant Li-Ro oppose the cross motion insofar as it seeks summary judgment because discovery has not been obtained from Mueser. However, a party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. (See, Keeley v Tracy, 301 AD2d 502; Baron v Newman, 300 AD2d 267; Hampton Living, Inc. v Carlton on the Park, Ltd.,

286 AD2d 664; Romeo v City of New York, 261 AD2d 379.) In the case at bar, Baker and Li-Ro failed to show that discovery is likely to produce evidence showing that Mueser had supervision and control over the work performed by the plaintiff, and, thus, the instant cross motion is not premature before the conclusion of discovery.

Accordingly, that branch of the cross motion by third-party defendant Mueser which is for summary judgment dismissing all of the claims against it is granted. The remaining branches of the cross motion by third-party defendant Mueser are denied as moot.

Turning next to the motion by third-party defendant Baker, the contractor contends that all of the claims against it should be dismissed on the ground of laches because MPI did not bring its third-party action until approximately three years after the plaintiff sued MPI, until more than two months after the plaintiff filed his note of issue, and nearly six years after the occurrence of the plaintiff's accident. "The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party***." (Skrodelisv Norbergs, 272 AD2d 316.) However, "[t]he mere lapse of time without a showing of prejudice will not sustain a defense of laches ***," (Skrodelisv Norbergs, supra.) In the case at bar, while the delay of third-party plaintiff MPI in bringing the third-party action is deplorable, the conclusory assertions of prejudice by third-party defendant Baker

do not warrant the dismissal of the claims against it on the ground of laches. Baker did not show specifically that it will be unable to obtain documentary evidence, physical evidence, or testimony from witnesses needed to prepare a defense.

Third-party defendant Baker also contends that the third-party action against it should be dismissed because MPI failed to comply with a clause of a Compliance Conference Order dated September 10, 2001 which states: "ORDERED that any further third-party actions shall be commenced promptly upon discovery of the identity of the third-party defendants, but not more than thirty days after the completion of depositions, unless for good cause shown." The plaintiff allegedly filed his note of issue on December 17, 2001. On February 2, 2002, defendant/third-party plaintiff MPI began the third-party action against Baker, Mueser, and Li-Ro. Baker speculates that the depositions were completed before the filing of the note of issue, but did not bother to ascertain whether or not the depositions were actually completed before the filing of the note of issue, and, if so, exactly when. Although the answering papers of MPI are also largely uninformative, Baker had the burden as the proponent of a summary judgment motion to show its entitlement as a matter of law. (See, Alvarez v Prospect Hospital, supra.) The record does not permit the court to determine if there was noncompliance with the deadlines imposed by a previous order, and, if so, whether the

circumstances of this case warrant extending the deadline pursuant to CPLR 2004.

Baker contends further that a severance of the third-party action against it is warranted. While MPI's delay in impleading third-party defendant Baker does not appear to be justified, a severance is not warranted under all of the circumstances of this case. (See, Pescatore v American Export Lines, Inc., 131 AD2d 739.) In the case at bar, the claims in the main action and in the third-party action are so closely related that a single trial is both appropriate and necessary for the sake of judicial economy. (See, Erbach Finance Corp. v Royal Bank of Canada, 203 AD2d 80.) "To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together***such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury***." (Rothstein v Milleridge Inn, Inc., 251 AD2d 154, 155.) The severance of a third-party action is not warranted unless a party's substantial rights would otherwise be prejudiced. (See, Rothstein v Milleridge Inn, Inc., *supra*; Andresakis v Lynn, 236 AD2d 252.) In the case at bar, the conclusory allegations of Baker that it has been prejudiced by being deprived of an opportunity to conduct discovery do not warrant a severance. Moreover, where a third-party defendant is permitted to conduct discovery expeditiously, there is no prejudice from the delay in serving the

third-party complaint (see, Zaveta v Portelli, 127 AD2d 760; Battipaglia v Barlow, 107 AD2d 1001), and, in the case at bar, this court will permit Baker to conduct discovery while the action remains on the trial calendar. Although it appears that ample time remains for Baker to expeditiously conduct discovery, the third-party defendant may, if it is so advised, upon a showing of good cause apply for a short stay of the trial to complete disclosure. (See, Villatoro v Talt, 269 AD2d 390.)

Accordingly, the motion by third-party defendant Baker Engineering NY, Inc. for, inter alia, an order pursuant to CPLR 1010 dismissing the third-party complaint and all of the cross claims against it is denied.

The cross motion by third-party defendant Li-Ro seeks similar relief on similar grounds as does the Baker motion, and Li-Ro's cross motion is without merit for substantially the same reasons.

Accordingly, the cross motion by third-party defendant Li-Ro is denied.

Short form order signed herewith.

J.S.C.